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Supreme Court of the United States

OCTOBER TERM, 1938

No. 127

MACKAY RADIO AND TELEGRAPH
COMPANY, INC.,

Petitioner,

vs.

RADIO CORPORATION OF AMERICA,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

✓ JO. BAILY BROWN,
ABEL E. BLACKMAR, JR.,
Counsel for Respondent.

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Statement.

Petitioner's "Summary and Short Statement of the Matter Involved" (pp. 2 to 5 of the Petition) opens with three paragraphs which, due to misleading and incorrect statements for which there is no basis in the record and which are now for the first time injected into the suit, give a false picture of the background of the litigation. Other paragraphs of petitioner's Summary likewise contain matters outside of the record and statements that are misleading and incorrect.

To correct the impression sought to be given by petitioner as to the "atmosphere" of the suit, respondent re-

*The opinion of the District Court herein is reported in 16 Fed. Supp. 610, and that of the Circuit Court of Appeals is reported in 96 F. (2d) 587.

states the subject matter of the first three paragraphs of petitioner's Summary as follows:

1. This is a patent infringement suit brought by respondent, Radio Corporation of America, on patents owned by that company. The invention set forth in the patent now before this Court was made by one of respondent's engineers after extensive research and experimentation had been carried on by respondent and its subsidiaries over a period of many years. American Telephone and Telegraph Company assisted petitioner at the trial herein in its attempt to invalidate certain of the patents including the one which is now before this Court. Instead of petitioner's facing a group it calls the "Radio Trust", the facts show that it was assisted by one of the corporations which it asserts (foot-note, p. 2) is a member of that group.

2. Petitioner is a public service company engaged in the radio telegraph transmission of public messages between the principal cities of the United States and foreign countries. Petitioner is not the only competitor of respondent's subsidiary, RCA Communications, Inc., in this field,—Globe Wireless Ltd. being another competitor. Respondent has licensed Globe Wireless Ltd. under the patents in suit and other patents useful in this field,* and has offered a license on the same terms to petitioner.

3. The present suit is an effort of respondent to require petitioner to pay for its appropriation and use, in competition with respondent's licensees (including its communications subsidiary), of inventions developed by respondent's engineers which promote reliable and economical radio communication.

*This is a matter of public record of which, we assume, the Court may take judicial notice. See, for example, extracts from proceedings before the Federal Communications Commission, quoted in Appendix A, *infra*, p. 17.

Summary of Respondent's Position and Argument.

For the sake of brevity and clearness, respondent, rather than restating, from its point of view, the subject matter of the remaining paragraphs of petitioner's Summary, indicates what it believes to be proper additions and corrections in connection with the following reply argument, arranged to correspond in number and subject matter to petitioner's "Reasons Relied Upon for the Grant of a Writ of Certiorari." A summary of respondent's position and argument follows:

I. (a) Under the facts of the present suit, the belated suggestion that respondent is a part of a "Radio Trust" and that the patent in suit is involved in a "patent pool" can furnish no basis for a review of this suit.

(b) Enforcement of the patent in suit would not give respondent a monopoly in public service radio telegraph communication because—

(1) petitioner was in that business before the patented invention came into use;

(2) numerous non-infringing types of directive antenna are shown by the record to have been used;

(3) petitioner's counsel has stated, since the decision of the Court of Appeals herein, that the infringing antennas have already been changed to a non-infringing form;

(4) petitioner is not the only competitor of respondent in this field; and

(5) petitioner has been formally offered a license under all of respondent's patents relating to radio communication on terms that have been accepted by another competitor.

II. The Court of Appeals did not reverse essential findings of fact made by the Trial Court on conflicting evidence, but merely reversed *conclusions* based on interpretation of the patent in suit and undisputed facts as to the structure and operation of petitioner's antennas and upon documentary evidence. This appears from the opinion of the Court of Appeals.

III. There is no reason to assume or assert that there is no likelihood of the Carter patent's again being involved in litigation in another Circuit.

IV. This suit does not involve any matters of great public interest or doubtful questions of law such as those considered in the cases cited by the petitioner. This is a simple patent suit involving a specific form of antenna which defendant may use, by paying a royalty, or without which, as it now asserts, it can carry on its business. No question of any kind whatever other than validity and infringement of the patent in suit is raised by the pleadings or proofs herein.

V. (a) Petitioner's statement that the patent is invalid because of improper amendment during prosecution of the application involves merely a consideration of the file history of the application. No conflicting testimony is involved. Respondent does not dispute the principle of law that new matter cannot be inserted by amendment. This issue was decided against petitioner by the Court of Appeals. An examination of the file history, which is in the record, will show that the decision of the Court of Appeals is correct.

(b) Petitioner's argument that its antennas were built before the patent issued, and that the patent in suit was

molded to cover its antennas, not only ignores the fact that the application for the patent, as filed, described the antennas subsequently built by petitioner, but also the fact that a complete description of the antenna as already built by respondent and as described in the patent had been published by the patentee the year before petitioner erected the infringing antennas.

(c) Petitioner's argument that the patent "is completely anticipated by and discloses no patentable invention over the prior published art" is sufficiently disposed of by the discussion of the prior art contained in the opinion of the Court of Appeals. The Trial Court did not hold the Carter patent invalid over the prior art.

ARGUMENT.

Point I. Answer to Petitioner's first Reason for asking for Certiorari.

(a) Petitioner asserts that the patent in suit is "in the patent pool which forms the so-called 'Radio Trust'".

This fact, if it were a fact, could only be of interest if the decision below would give to respondent, as a supposed member of the so-called "Radio Trust", a practical monopoly in the public service radio communication business. As we will show, later on under this Point, the decision cannot have that effect. But aside from that, the following facts should be noted:

Petitioner was assisted at the trial by American Telephone and Telegraph Company, which petitioner asserts to be a member of what it calls the "Radio Trust". Petitioner called six witnesses* who were employees of a subsidiary company of American Telephone and Telegraph

*Rec., Vol. I, pp. 493, 552, 553, 557, 559, 577.

Company in an effort to establish prior invention of the subject matter of the Carter patent which is now before this Court. Furthermore there is not one word of pleading, testimony, or other evidence intended or tending to show that the present suit is directed, as petitioner alleges, to an effort on the part of respondent to eliminate competition in its public service operations. The suit furnishes no vehicle for consideration of the collateral issues that petitioner seeks to inject for the first time in this Court. Therefore the *innuendo* involved in the reference to the so-called "Radio Trust" furnishes no basis for review of this suit.

(b) Petitioner asserts that enforcement of the patent in suit would vest in respondent "a complete monopoly in public service radio telegraph communication" and that the decision of the Court of Appeals therefore materially affects public interest. This argument is based on false premises.

(1) Petitioner was in the public service radio communication business before it used the specific V-form directive antenna structure which alone is involved in this suit. Furthermore, the record shows* that, after the commencement of the present suit, there were installed, at petitioner's Sayville, Long Island, station, non-infringing types of antennas for communication with Europe, South America, San Francisco, etc.

(2) There are numerous other types of directive antennas described in this record, some of which are shown in foreign patents or patents that have expired and which are therefore open to petitioner to use for carrying on its business. Types of directive antennas that have been successfully used commercially and

*Vol. I, pp. 73-74; Vol. II, p. 810.

which do not embody the Carter invention are described in the record at pages 55-65 and 71-73 of Vol. I. All that petitioner is confronted with is the necessity of paying royalty if it desires to use the specific antenna structures developed by respondent and covered by the patent in suit.

(3) Petitioner's counsel, since the decision of the Second Circuit Court of Appeals in this case, has asserted *that petitioner has already changed its antennas over to a non-infringing and better form.*

(4) Petitioner is not the only competitor of respondent's communication subsidiary. Globe Wireless Ltd. is competing with respondent under license under respondent's patents, and there is a Mackay Radio and Telegraph Co. of California that is engaged in competition both with respondent's subsidiary and with Globe Wireless.

(5) Respondent has for years held the door open to petitioner to take a license under its patents. *Shortly after the decision of the Second Circuit Court of Appeals herein, respondent formally offered to license petitioner under the Carter patent and all other of its patents in the communication field upon the same terms that respondent has licensed its own communication subsidiary and Globe Wireless Ltd.**

Point II. Answer to Petitioner's second Reason for asking for Certiorari.

Petitioner asserts that the Court of Appeals in finding the Carter patent valid and infringed reversed "every essential finding of fact made by the District Judge on conflicting

*This offer was made by a written communication between the parties hereto, quoted in Appendix B, *infra*, pp. 17-18.

evidence," and that this action was contrary to the rule of *Adamson v. Gilliland*, 242 U. S. 350.* Petitioner refers to two findings which it says should have been treated as unassailable, namely (1) that petitioner's antennas differed radically from those disclosed in the Carter patent, and (2) that the application for the Carter patent was improperly broadened in scope during the prosecution thereof in the Patent Office.

Petitioner's position is unsound because the Court of Appeals merely reversed *conclusions* drawn from *undisputed* facts.

(1) *There was no conflict in the evidence relating to the facts upon which the Trial Court's conclusions as to infringement of the Carter patent were based.* The conflict was as to the *disclosure* and *interpretation* of the patent in suit. The Trial Court, in its opinion, at 16 Fed. Supp. 611 (Rec., Vol. II, p. 1347), said:

"There is no dispute as to the construction or arrangement of the defendant's antenna systems, and they are fully described in the agreed descriptions, diagrams, and tabulations of dimensional data comprising plaintiff's Exhibits 7 to 13, inclusive." [Rec. Vol. I, pp. 46-7; Vol. II, pp. 693-718.]**

Likewise, the expert witnesses for both parties agreed as to the operation of petitioner's antennas.†

With respect to the Carter patent that is before this

*The issue of fact which was involved in the *Adamson case* was one that was required to be proved "beyond a reasonable doubt". The case of *Davis v. Schwartz*, 155 U. S. 631 (which this Court cited in the *Adamson case* on this point), specified the situations in which findings of fact must be treated as unassailable; the trial in open court of a suit in equity was not one of the specified situations. Where, as in the present suit, the findings of the Trial Court do not depend upon conflicting testimony or upon the credibility of witnesses, they do not have the weight ordinarily attaching to findings of fact. *Muramura, Arai & Co. v. Taback*, 279 U. S. 24, 33.

**Emphasis throughout this brief is ours.

†Rec., Vol. I, pp. 399-401, XQ. 1167.

Court, the Trial Court did not even discuss the prior art antenna patents. Its only "essential finding" was non-infringement, based on its conclusion that the operation of the petitioner's antennas was not that described in the patent. Since the *structure* and *functioning* of petitioner's antennas were undisputed, the finding was obviously based on an *interpretation* of the patent, a matter of law for the Court. Consequently, in reversing on this point, there was no overruling of any finding of fact (essential or otherwise) based on testimony. That appears quite clearly from a comparison of the two opinions below.

For example, the opinion of the Court of Appeals, at 96 F. (2d) 589, 590 (Rec., Vol. II, pp. 1404, 1405), covers the matter of infringement as follows:

"Appellee [petitioner] constructs its V-antennas . . . utilizing in most instances substantially the exact angle specified by Carter, and places them upon poles 80 feet high and secured antennas that were effective in the identical directions that Carter described. *Structurally the antennas are Carter's and secure the same results as he describes*, that is, concentration of radiation on the distant receiving antenna, simplicity, and efficiency. They are used to obtain the results Carter sought.

* * *

"The main consideration is that Carter described a practical directive antenna which is of great commercial utility when used just as he said it was to be used. He was concerned with antennas which would concentrate the radiation in certain compass directions. *These antenna structures are used by both appellant and appellee.*"

Every *fact* stated in the foregoing quotation was clearly established by the record.* Petitioner sought to limit the

*Petitioner does not assert that the decision of the Court of Appeals is not sustained by the record, but merely (pp. 5, 13) that that court did not "cite any evidence" to support its conclusions.

patent disclosure to predominant radiation, at all distances from the antenna, in an exact plane and on a line in that plane. The Trial Court accepted that argument. The Appellate Court rejected such a narrow *interpretation* in the words above quoted.

(2) As the matter of the amendment of the application for the Carter patent is specifically mentioned in petitioner's fifth reason relied upon for the grant of the writ, that matter will be discussed below under Point V, section (a).

Point III. Answer to Petitioner's third Reason for asking for Certiorari.

Petitioner says there is no likelihood of further litigation on the Carter patent. In making this statement, petitioner overlooks a number of facts.

Thus, there is a Mackay Radio and Telegraph Co. incorporated in the State of California which we are informed is not a subsidiary of petitioner. This California corporation, so far as known to respondent, is not engaged in business in the Second Circuit but is engaged in business in the Ninth Circuit and possibly elsewhere. The California corporation has utilized, in its public radio telegraph communication business, antennas embodying the invention of the Carter patent in suit. If that use is continued, the Carter patent will undoubtedly be involved in further litigation in another Circuit than the Second Circuit.

Furthermore, although the Carter antenna is of the directive type and is, therefore, particularly adapted to point-to-point communication, yet "world-wide public radio telegraph communication" is not the only type of point-to-point communication. In fact, the Carter antenna is now in use for other purposes.

There is thus no reason to assume or assert that there is no likelihood of its again being involved in litigation in another Circuit.

Point IV. Answer to Petitioner's fourth Reason for asking for Certiorari.

We respectfully submit that there are no facts or circumstances in this case which call for the exercise of this Court's discretion to grant the writ of certiorari in the absence of a diversity of opinion between Circuit Courts of Appeals. There is no novel, doubtful, or unsettled proposition of law involved in the case and for this reason the situation which existed in *The Barber Asphalt case*, 302 U. S. 458, and in the *Carbice Corporation case*, 283 U. S. 27, is not here present. Neither is the patent of such character as to dominate an entire industry, as was the case with respect to the Langmuir so-called "high vacuum patent" which was involved in the *DeForest Radio Co. case*, 283 U. S. 664, and which, if sustained, would have given its owner a practical monopoly with respect to a device essential to all phases of the radio art,—the vacuum tube. Neither have there been subsequent suits instituted on the Carter patent in an effort to dominate an industry as was the case in the *Paramount-Publix Corporation and Altoona Publix Theatres, Inc., cases*, 294 U. S. 464 and 477. Neither is the situation in the present case like that which existed in the *Scriber-Schroth Co. v. Cleveland Trust Co. and associated cases*, 303 U. S. (Advance Sheet No. 2, page v), where three suits had been instituted in the Sixth Circuit and where the decision of the Sixth Circuit Court of Appeals controlled "virtually the entire industry throughout the United States, at least ninety-five per cent. of it" (quoting from the Second Petition for Rehearing therein).

The present case, involving no diversity of opinion between Circuit Courts of Appeals, and no novel, doubtful, or unsettled proposition of law, no decision that is inconsistent with decisions of this Court, and no question of great public interest, is clearly not one calling for the exercise of this Court's discretion to review the decision of the court below.

Point V. Answer to Petitioner's fifth Reason for asking for Certiorari.

(a) Petitioner asserts that the patent in suit is invalid because of improper amendment of the application after knowledge was obtained of petitioner's antenna structures. The amendments which petitioner criticizes were filed July 13, 1934, and August 4, 1934, which (contrary to petitioner's assertion) was *prior* to respondent's receiving the particulars as to the structure and operation of petitioner's antennas, which information was received on August 14, 1934.

This question of departure from the original subject-matter revolves around whether or not the original application disclosed and claimed antenna wires that were not, in length, multiples of half a wave length. Petitioner argued that claims and description addressed to such matter had been inserted by amendment. It referred the Courts below to amendments that rephrased and emphasized such subject-matter, but *ignored the original application upon which the amendments were based.*

The file history of the patent in suit is reproduced in the record (Vol. II, pp. 1244-1343). It shows that *Carter's application as filed described and claimed the structure that petitioner uses.* See, for example, claims 19 and 20

of the original application at Vol. II, p. 1259. *These claims in their original form read directly on petitioner's antennas in both words and substance.* They were never canceled, and with certain amendments of detail, constitute the claims now in suit. And see also the fourth paragraph,* Vol. II, page 1244, and the last paragraph** on page 1250, Vol. II of the record, in the application *as filed*. These parts of the original specification clearly cover wires of "any finite length" and specifically refer to wires having "lengths between odd and even number of half wave lengths".

Petitioner made this same argument on the file history to the Trial Court, which followed the argument literally, apparently without reading the application as filed. Petitioner repeated this argument to the Second Circuit Court of Appeals, *which specifically reversed the Trial Court on this point*, saying, in its opinion, at 96 F. (2d) 590 (Rec., Vol. II, p. 1405):

"Carter's *application* stated that the invention was applicable to wires of any finite length. His *original application* included the empirical formula and the curve of that formula is shown and described."

*"Still a further object of the present invention is to disclose the proper angle for conductors or radiators either an even number of half wave lengths long or an odd number of half wave lengths long, and, in general to disclose the angle for best directional propagation for wires of any finite length."

***"Moreover, it should be clearly understood that the wires of each unit can be of any length whatsoever provided they are placed at the correct angle for their length. For best tuning, the total overall length of both of the wires and the 'U' loop terminating them should be effectively an integral number of half wave lengths, but, the portion forming the radiation element can be of any length. The law, giving the correct angle for lengths between odd and even number of half wave lengths, is not given due to its complexity, but, the empirical formula and the curve of figure 12 will be found accurate for all practical purposes, where the length of wire dealt with does not correspond to a whole number of half wave lengths."

In effect, what petitioner now asks this Court to do on this point is to study the voluminous file history and determine whether the Second Circuit Court of Appeals was right in saying that the original application supports the claims in suit, or the Trial Court was right in saying that it does not. *There is no other evidence pertinent to this issue. There is no conflict of testimony upon it. Decision of this issue is purely a matter of construing a written record.* No law point is involved because respondent has not questioned the established law as to insertion of new matter by amendment.

(b) Paragraph 9, page 5, and later argument in the petition might lead the Court to believe that there is some equity in petitioner arising from the fact that its antennas were erected and their structure disclosed to respondent prior to issuance of the patent in suit. Petitioner omits telling the Court that *before petitioner erected any of the V-antennas here involved, respondent's engineers had produced the Carter V-antenna covered by the patent in suit, had erected and used it commercially, and had given a complete technical, structural, and operative description of this antenna in a paper delivered before the Institute of Radio Engineers on June 6, 1931, and published in the Proceedings of the Institute for October, 1931.* That paper is printed at pages 725-794 of Vol. II of the record. It contained, according to undisputed testimony,

“sufficient information as to structure, arrangement, and adjustments to enable a radio engineer to construct and operate the antennas there described.”
(Rec., Vol. I, p. 67.)

It was in the year following this published description of the Carter antenna that petitioner built its infringing an-

tennas, copying the Carter V-antenna disclosure of the previously published scientific paper with great fidelity of detail and without adding any new or improved feature. In spite of the fact that petitioner's Chief Engineer testified at the trial (Rec., Vol. I, p. 285), there is no testimony in the record denying the clear inference that petitioner copied the antennas that had been erected by respondent's subsidiary and publicly described by the inventor. Under such circumstances, there can be no equity in petitioner arising from the fact that the Carter patent did not issue until after its antennas were erected.

(c) The petition also asserts in its fifth reason for asking for certiorari that the Carter patent "is completely anticipated by and discloses no invention over the prior published art".

The Trial Court did not discuss any published prior art descriptive of antennas, and did not hold the Carter patent invalid over the prior art. The Court of Appeals discussed the prior art relied on by petitioner and held the patent valid. There is therefore no conflict of opinion below as to validity. No reason for this Court to review the decision on validity appears from petitioner's argument. We think it superfluous in this brief to seek to add to the opinion of the Court of Appeals on this point.

CONCLUSION.

The subject-matter of the present suit is not, as petitioner would make it appear, petitioner's right to stay in the business of public service radio communication. It involves merely petitioner's right to infringe a patent of which the Second Circuit Court of Appeals says:

"The problem solved here was of long standing and it was an eminently successful solution. Critical examination of prior patents and uses finds nothing invalidating the Carter invention and it shows a substantial accomplishment." (96 F. (2d) 591; Rec., Vol. II, p. 1408.)

The sole questions in the case now are whether that patent is valid and infringed. There are no pleadings or proofs furnishing any basis for consideration of any other question.

There is no novel, doubtful, or unsettled proposition of law even asserted by the petition. Respondent does not question the principles of law that would make a patent invalid if the claims in suit were added by amendment without proper basis in the application as filed, or that findings of circumstantial fact of a Trial Judge based on conflicting testimony are generally to be followed by the Courts of Appeals. Such law is fully established and is undisputed here. This Court could add nothing to it in this case.

There is no more reason for this Court's reviewing the present suit than for its reviewing each and every suit where a patent has been held valid and infringed.

We submit that the petition is without merit and should be denied.

Respectfully submitted,

JO. BAILY BROWN,
ABEL E. BLACKMAR, JR.,
Counsel for Respondent.

APPENDIX A

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Excerpts from statement made to Federal Communications Commission June 24, 1938, concerning the license from Radio Corporation of America to Globe Wireless Ltd., dated February 11, 1938.

"Globe is licensed to make or have made for it all radio apparatus required for rendering a radio telegraph public service and therefore may obtain its apparatus requirements from any source which it may use. * * * RCA has agreed to furnish to Globe with the latter's apparatus requirements at prices and upon terms and conditions as favorable as those granted to other customers purchasing such equipment in similar quantities. * * * RCA has also agreed to furnish information to enable Globe to adopt and utilize apparatus and technical improvements similar to those utilized in commercial service by RCA, and its subsidiaries rendering telegraph public service."

APPENDIX B

[LETTER-HEAD OF RADIO CORPORATION OF AMERICA]

May 4, 1938.

MACKAY RADIO & TELEGRAPH COMPANY, INC.,
67 Broad Street,
New York City.

Gentlemen:

This refers to the decision of the United States Circuit Court of Appeals for the Second Circuit handed down on May 2, 1938 holding our Carter patent No. 1,974,387 dated September 18, 1934 valid and infringed by the Mackay Radio & Telegraph Company, Inc.

[APPENDIX B, *continued*]

As you know, Radio Corporation of America has heretofore expressed its willingness to grant a license under its patents to Mackay Radio & Telegraph Company, Inc. In 1929 a license was offered to you, and in a recent public hearing before the Federal Communications Commission our counsel renewed the expression of willingness to license you. This was in accordance with the policy of RCA to license its competitors including those in the fields of public service radio telegraph communication. Among others, a license has been granted to Globe Wireless, Ltd. in this field.

Radio Corporation of America hereby repeats its offer to grant to Mackay Radio & Telegraph Company, Inc. a license under its patents including the above-mentioned Carter patent and all others in respect of which it has the right to grant licenses to others. The royalty under such a license would be four and one-half per cent (4½%) of the Mackay Company's gross revenues derived from its public service radio telegraph communications business. This is the same royalty as that payable by Globe Wireless, Ltd. and by our subsidiary, RCA Communications, Inc., under their license agreements with us.

If you are interested in acquiring such a license we shall be pleased to enter into the negotiation thereof with you.

Yours very truly,

O. S. SCHAIRER
[Vice President]

OSS:MH.